COHEN LORRAINE PHILIS & ANOR.

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
HASHIM YEOP SANI CJ (MALAYA)
LEE HUN HOE CJ (BORNEO)
EUSOFFE ABDOOLCADER SCJ
MOHD. YUSOFF MOHAMED SCJ
[CRIMINAL APPEAL NO. 67 OF 1987]
22 AUGUST 1989

CRIMINAL LAW: *Dangerous Drugs - Section 39B(2)(a) of the Dangerous Drugs Act 1952 - Trafficking - Defence of personal consumption - Whether personal consumption can constitute a defence in law in view of the wide definition of trafficking - Whether the presumption of trafficking was rebutted - Medical evidence and intravenous injection marks.*

The appellants Cohen Lorraine Philis and Cohen Aaron Shelton were charged under s. 39B(2)(a) of the Dangerous Drugs Act 1952 for trafficking. Cohen Lorraine Philis was found guilty and sentenced to death by hanging. Cohen Aaron Shelton was found guilty on an amended reduced charge under s. 39A of the Act and was sentenced to life imprisonment and six strokes of the rotan.

The prosecution evidence was straight forward. The two appellants were found carrying drugs. The drugs wrapped in plastic packets were found in the underpants of both the appellants.

In their defence both the appellants read their written statements from the dock. Both stated they were drug addicts and that the drugs were for their own consumption.

The Court had to consider two important issues:

(1) Whether in a prosecution under s. 39B of the Act an accused can put up the defence that the drugs found in his possession is intended for his consumption and not for the purpose of trafficking.

(2) Whether the 1st appellant had rebutted the presumption of trafficking.

Held:

[1] That in a prosecution under s. 39(B) of the Dangerous Drugs Act 1952, the defence of personal consumption was available. But whether it will succeed would depend on the facts of each case.

[2] The 1st appellant had rebutted the presumption of trafficking for the following reasons:

(a) The medical evidence adduced showed that the appellant was still a chronic addict and not properly treated.

(b) The learned trial Judge had not given consideration to the intravenous injection marks on the appellant's arms and thighs.

[1st appellant's appeal allowed and substituted with a conviction and sentence under s. 39A of the Act. 2nd appellant's appeal dismissed. The Public Prosecutor's appeal dismissed.]

Case referred to:
PP v. Yuvaraj [1969] 2 MLJ 89

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39A, B(2)(a)
Dangerous Drugs Ordinance, s. 37(da)

For the appellant/respondent - Karpal Singh (Oh Ghee with him); M/s. Karpal Singh & Co.
For the respondent/appellant - Ng Aik Guan, DPP

JUDGMENT

Abdul Hamid Omar LP:

Cohen Lorraine Philis and Cohen Aaron Shelton were appellants in SCCA No. 67 of 1987 appealing against their conviction and sentence. The Public Prosecutor was the appellant in SCCA No. 66 of 1987 in respect of the conviction and sentence of Cohen Shelton on a reduced charge under s. 39A of Dangerous Drugs Act 1952 (the Act).

Cohen Lorraine Philis and Cohen Aaron Shelton were charged under s. 39B(2)(a) of the Act before the learned Judge of High Court in Pulau Pinang for possession of dangerous drugs, to wit 140.76 grams and 34.61 grams, of heroin respectively on 19 February 1985 at the Singapore Airlines counter, International Airport, Bayan Lepas in the state of Pulau Pinang. Hearing commenced on 10 August 1987 and on 1 September 1987 Cohen Lorraine Philis was found guilty of the charge and was sentenced to death by hanging. On the same day Cohen Aaron Shelton was found guilty on amended reduced charge under s. 39A of the Act and was sentenced to life imprisonment from date of arrest and six strokes of the rotan.

The prosecution evidence was straight forward. An officer attached to the Cawangan Anti-Dadah at the International Airport (PW1) had information that two Caucasians, a male and a female, were carrying drugs. PW1 then went to the check-in counter of the Singapore Airlines and saw both appellants in Criminal Appeal No. 67 of 1987 lining up to check in. PW1 identified himself as a police officer by displaying his authority card and asked for their passports and travel documents. PW1 then took them to the inspection room. A search was made on both the appellants separately. A female constable from the security unit of the International Airport (PW2) made a search on the female Causasian. As a result of the examination drugs wrapped in plastic packets were found in the underpants of both the appellants in Criminal Appeal No. 67 of 1987.

In their defence both the appellants read their written statements from the dock. Cohen Lorraine Philis was the mother of Cohen Aaron Shelton. Both stated they were drug addicts and that the drugs were for their own consumption.

In respect of Cohen Lorraine Philis she stated that at the time of her arrest she needed 4 to 8 grams per day of heroin. The street value of heroin in Pulau Pinang then (in 1985) was RM12 per gram. She came to Pulau Pinang after receiving an inheritance of approximately NZ$10,000 at the end of 1984. She said that what she had when arrested was intended for her own personal consumption.

She also said that she came to Pulau Pinang as a result of a domestic quarrel with her *de facto* husband who physically assaulted her in a serious way. She was frightened and decided to come to Pulau Pinang with her son, Cohen Aaron Shelton. The rest of the statement dealt with the unfortunate incidents with her *de facto* husband.

In his statement Cohen Aaron Shelton also admitted that he began smoking heroin at the age of 15 years. He also related the unhappy incidents between his mother and her *de facto* husband in Australia. According to him when they came to Penang in December 1984 he began to use heroin regularly and his addiction grew because heroin was cheap and readily available in Pulau Pinang and his daily use increased accordingly. Within 48 hours of his arrest he began to suffer withdrawal from heroin and was taken to Penang General Hospital.

Medical evidence was also adduced to support the defence of Cohen Lorraine Philis. The medical evidence were from one Dr. Fraser McDonald (DW3), a psychiatrist attached to the Carrington Hospital, Auckland, New Zealand who recognised Cohen Lorraine Philis as a patient at a drug clinic in Auckland. According to DW3, Cohen Lorraine Philis was heavily addicted. Medical evidence were also obtained from one Dr. Stella Yvette Dalton (DW4). DW4's experience included acting as consultant psychiatrist in the heroin maintenance clinics in London hospitals. In 1968 DW4 became director of addiction services for Department of Health, New South Wales, Australia. In 1974 DW4 established community service for the health department and had been attending international conferences as an Australian expert on drug addiction. DW4 met Cohen Lorraine Philis for the first time in 1970 for treatment for drug addiction. DW4 testified that the appellant had been treated for drug addiction between 1970 and early 1981. DW4 also stated that she saw appellant again in 1984, four times in all, and found that appellant was still a chronic addict and was not properly treated.

In the case of Cohen Aaron Shelton the medical officer attached to the General Hospital, Pulau Pinang, (DW7) corroborated the statement of Cohen Aaron Shelton that he was admitted to the General Hospital on 12 February 1985 after he complained of fever. The diagnosis was drug withdrawal. The appellant was discharged on 18 February 1985 after being treated by two doctors, Dr. Han and Dr. Aung.

A number of points were raised in the memorandum of appeal in Criminal Appeal No. 67 of 1987. Among the points raised were the issue of joint trial, the alleged irregularity in the body examination carried out on both appellants, the alleged break in the chain of evidence relating to the exhibits and the alleged misdirection on the part of the learned Judge when considering the scars on the arms of Cohen Lorraine Philis.

We carefully considered all the points raised by Mr. Karpal Singh for the appellants in Criminal Appeal No. 67 of 1987.

Except for one matter which we will shortly advert to we could not find the other points raised, on a total view of the evidence, caused any miscarriage of justice or had sufficient merit to justify interference by us.

However with regard to the appeal by Cohen Lorraine Philis on the ground that she was in fact an addict and not a trafficker, we found that unfortunately the learned Judge had not given the consideration to this aspect of the case, particularly in the matter of the bodily deformations that were exhibited with regard to intravenous injection marks on her arms and thighs as he did not refer to the photograph of the appellant in this connection and more particularly seemed to have been under the impression that these marks were the result of assault by the *de facto* husband in spite of the matter having been raised in the medical evidence adduced.

In view of this we felt that it was necessary to give the appellant the benefit of the doubt and quashed the conviction and sentence under s. 39B and substituted a conviction and sentence under s. 39A of the Act for possession of the drugs and sentenced her to life imprisonment with effect from date of arrest.

The appeal by Cohen Aaron Shelton was dismissed.

Then we considered the appeal by the Public Prosecutor in respect of the conviction and sentence against Cohen Aaron Shelton on the reduced charge in Criminal Appeal No. 66 of 1987.

This appeal was based on a substantial point raised by Public Prosecutor that trafficking is defined specifically by s. 2 of the Act to include "carrying", "keeping" and the like and that accordingly it was not open to the Judge, in view of this definition, to reduce the charge as he did as such a plea of personal addiction to a charge of trafficking is not available to a person accused of such offence.

The crucial question is whether in a prosecution under s. 39B of the Act an accused can put up the defence that the drugs found in his possession is intended for his own consumption and not for the purpose of trafficking.

Hitherto Deputy Public Prosecutors in every case have always asserted the proposition that because of the wide definition of "trafficking" under the Act the defence that the drugs is for the accused's own consumption does not constitute a defence in law and should be rejected outright. Mr. Ng repeated the same proposition before us.

In our view that is not a correct proposition of law.

Despite the wide definition of the word "trafficking" in the Act and that as stated by this Court in *Teh Geok Hock v. Public Prosecutor* SC Criminal Appeal No. 72 of 1987 the definition sounds artificial and not in accordance with the ordinary meaning of the word "trafficking", it does not mean that the defence of own personal consumption can never be raised at all by evidence.

It is implicit in the judgment in *Teh Geok Hock* that the defence of own personal consumption is available but whether it will succeed would depend on the facts of each case. In our view to say that the defence of personal consumption is never available is to render meaningless the law on statutory presumption as stated in *PP v. Yuvaraj* [1969] 2 MLJ 89 which has been accepted by our Courts and become part of our law.

Thus we cannot accept the point by the Deputy Public Prosector in this regard in the light of the rebuttable presumption specifically provided for in s. 37(da) of the Dangerous Drugs Ordinance.

Having also considered the factual aspects in the grounds of appeal, we found no merit and would accordingly dismiss the appeal in criminal appeal no. 66 of 1987 and affirm the conviction and sentence on the respondent Cohen Aaron Shelton.

We would however immediately add that we do indeed appreciate that the quantity of heroin found on the person of Cohen Lorraine Philis was not inconsiderable but we have substituted a conviction for possession under s. 39A of the Act only in wholly exceptional circumstances of this case for the reasons we have given in respect of the learned Judge's consideration of the matter and in the light of the appellant's sordid history of addiction and background borne out by the medical evidence adduced. We would therefore like to make it very clear that our decision here rests wholly on the particular circumstances of this particular case and must not be taken as a licence for the general contention of personal consumption irrespective of the quantity of drugs involved.

Also found at [1989] 2 CLJ 956